POH CHO CHING v. PUBLIC PROSECUTOR

[R.Cr.J. (Wan Yahya J.) February 25, 1981]

[Melaka — Criminal Application No. 1 of 1981]

Criminal Law and Procedure — Charge of corruption — Charge against giver of bribe withdrawn — Whether this affects legality of charge against receiver of bribe — Imposition of penalty — Bribe given to private company — Criminal Proceaure Code, s. 254 — Federal Constitution Article 145(3) — Prevention of Corruption Act, 1961, ss. 4(1)(b) & 13.

In this case the applicant was convicted on his plea of guilty to a charge of accepting a bribe under section 4(1)(a) of the Prevention of Corruption Act, 1961. The giver of the bribe was arrested with the applicant but the case against him was withdrawn and he was acquitted and discharged. The applicant appealed against his conviction but he did not proceed with the appeal. The trial court also made an order for the payment of a penalty of the amount of the bribe to the Government. The applicant applied for revision and submitted that the charges and penalties imposed were illegal.

Held: (1) the power to withdraw a charge is exercisable by the Public Prosecutor and the court cannot question the exercise of this power;

(2) the applicant has not shown that the Public Prosecutor had acted unlawfully in withdrawing the charge against the giver of the bribe and had deprived the applicant of his right of equality before the law;

(3) where it is shown that an accused person has received a bribe, the court has no alternative but to impose the additional mandatory penalty on him. If the body for which the bribe is taken is not a public body, the court will make an order for a sum equivalent to the gratification received to be paid to the Federal revenue;

(4) the sentence of 9 months' imprisonment imposed in this case could not be said to be manifestly excessive and therefore should not be disturbed.

Cases referred to:-

(1) *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50.

(2) *Lee Mun Foong* v. *Public Prosecutor* [1976] 2 M.L.J. 16, 17.

(3) *Public Prosecutor* v. *Datuk Haji Harun bin Haji Idris* [1977] 2 M.L.J. 155.

(4) *Mohamed bin Long* v. *Public Prosecutor* [1972] 1 M.L.J. 76.

CRIMINAL REVISION.

Karpal Singh for the applicant.

Suriadi bin Halim Omar (Deputy Public Prosecutor) for the respondent.

Wan Yahya J.: The applicant, Poh Cho Ching, and one Liang Sing Kup were arrested and charged before the Sessions Court in Melaka on October 14, 1980. The three charges against each of them were almost identical save that the applicant was charged as an acceptor under section 4(1)(a) and Liang Sing Kup as the giver of the bribe under section 4(1)(b) of the Prevention of Corruption Act, 1961. On December 3, 1980 both the accused persons were brought before the same Sessions Court. In this instance the consent to prosecute the applicant alone was produced and he was convicted on his plea of guilty. However, Liang Sing Kup's pleas were not recorded and on the application of the Prosecuting Officer his case was mentioned again on January 5, 1981 at which date he was acquitted and discharged after the prosecution withdrew the charges against him.

Now, though the applicant had been released on bail pending an appeal, no written appeal in its proper form had been filed in court. Three days after bail was granted, the applicant's counsel, who had acted for Liang Sing Kup as well, wrote to the court stating that the applicant did not want to proceed with his appeal and that he would be surrendering himself for committal to prison, but it was only on the 13th of that month that the applicant surrendered and was committed to prison.

On January 31, 1981 the applicant, now through his new counsel, Mr. Karpal Singh, has filed the present motion for revision.

There are two matters which have been raised in this court, one relating to the legality of the charges and the other to the legality of the penalties imposed.

On the first ground counsel submits that the withdrawal of the charges against Liang Sing Kup had affected the legality of the charges against the applicant. According to counsel, the charges against the applicant specifically stated that the gratifications were received from Liang Sing Kup and the withdrawal of the charges against Liang Sing Kup by the Public Prosecutor would by inference denote that the prosecution considered the charges against him, as the giver of the bribes, groundless. Counsel concludes that, if that be the case, by direct reasoning the charge against the applicant too should be held to be groundless. To put it more simply in counsel's own language, the offence of receiving gratification involves two parties — the giver and acceptor of the bribe — and if there was no giver, how could there be an acceptor?

The reasoning is indeed a novel one if withdrawal of a charge against the giver negates involvement in the act, which he was alleged to have committed, or the withdrawal of charges against him was affected before the acceptor pleaded guilty. But would such an implication arise in our present case? I do not think so. The power to withdraw a charge against any person and to discontinue proceedings is spelt out in section 254 of the Criminal Procedure Code and Article No. 145(3) of the Federal Constitution, which read as follows:

"254. (i) At any stage of any trial, before the delivery of judgment, or in the case of a trial by jury before the return of the verdict, the Public Prosecutor may, if he thinks fit, inform the court that he will not further prosecute the accused upon the charge and thereupon all proceedings on such charge against the accused shall be stayed and the accused shall be discharged of and from the same.

(ii) At any stage of any trial before a Sessions Court or the Court of a Magistrate before the delivery of judgment, the officer conducting the prosecution may, if he thinks fit, inform the court that he does not propose further to prosecute the accused upon the charge, and thereupon all proceedings on such charge against the accused may be stayed by leave of the court and, if so stayed, the accused shall be discharged of and from the same.

(iii) Such discharge shall not amount to an acquittal unless the court so directs."

"Art. 145 (3). The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

This power, exercisable by the Public Prosecutor, who is the Attorney-General, is similar to the power to stay proceedings in English courts and better known technically as *nolle prosequi*. This power may be invoked by the Attorney-General in various instances,

to cite one instance, in cases where he requires a co-accused to give evidence for the crown against the other accused person. This power undoubtedly confers upon the Attorney-General an unrestricted discretion in respect of which he is expected to exercise extreme fairness and sagacity. But whether he does so or not, it is not for the courts to decide. The exercise of such power by the Attorney-General is not subject to control by our courts but in most democratic governments is questionable elsewhere — perhaps in Parliament. It is not for the courts, therefore, to enquire into the manner or reasons for the exercise of *nolle prosequi*. In the absence of this information this court is unable to imply that mere withdrawal of a charge against a co-accused by the Public Prosecutor presupposes that the co-accused had taken part in the offence.

It was also contended by counsel that by preferring the giver to the acceptor of bribes the Attorney-General was departing from Article 8(1) of the Federal Constitution. The effect of Article 145(3) considered with Article 8(1), has been discussed in the Privy Council case of *Teh Cheng Poh* v. *Public Prosecutor*[1] where Lord Diplock in delivering judgment said:

"There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them, may vary enormously between one case and another. All that equality before the law requires is that the cases of all potential defendants to criminal charges shall be given unbiassed consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration."

In our present case too the applicant has not succeeded in showing that in withdrawing the charge against the giver, the Attorney-General had acted unlawfully and had deprived the applicant of his right of equality before the law.

On the question of legality of punishment Mr. Karpal Singh submits that, as the charges relate to the giving of bribes to the National Semiconductor Electronics Sdn. Bhd., which is not a public body, the Sessions Court had no power to impose the additional sums as penalty. The learned counsel relied on a part of the judgment of Wan Suleiman F.J. in the Federal Court case of *Lee Mun Foong* v. *Public Prosecutor*[2] which reads as follows:

"Incidentally, the words 'to such body' in section 13 appears to me to restrict orders of payment of the penalty made under this section to public bodies, so that when the principal is not a public body as defined in the Act, he can only hope to recover money or the value of gratification corruptly given to his agent under section 30 or by order made under section 407(ii) of the Criminal Procedure Code."

I have read the passage referred to but am unable to agree with counsel's contention that it restricts a court from making an order under section 13 where the body is not a public body. Now the full implication of the passage from any judgment can never be properly construed and appreciated unless it is considered in line with the entire judgment. Passages lifted out and read in isolation can often be misleading, if not misunderstood. In *Lee Mun Foong's* case the Federal Court, answering a question of law reserved and placed before it by a High Court, had ruled that the additional penalty under section 13 of the Prevention of Corruption Act was mandatory and must be imposed in any case. Indeed at page 18 of his judgment, the learned Federal Judge, in answering the question reserved, said:

"I would respectfully agree with the learned judge that the mandatory penalty under section 13 of the Act must be imposed regardless of whether the gratification given is recovered or not."

In the context of this the passage read earlier must obviously mean that a court cannot make the order of payment under section 13 to a private body. But it does not restrict the court from making the order of payment to a public body or to Federal revenue. Indeed, according to both Federal Court authorities in *Lee Mun Foong's* case, *supra* and *Public Prosecutor* v. *Datuk Haji Harun's*[3] case, such order must be made in the form of additional penalty. At page 180 of *Datuk Harun's* case, Suffian L.P. said:

"We are of the opinion that the above provision is very clear. Where a court convicts a person of an offence committed by the acceptance of a sum of money by way of gratification, then it shall, *in addition* to imposing any other punishment, order him to pay as a *penalty* within the time and to the body and in the manner specified in the order, a sum equal to the amount of the gratification. Accordingly, we are of the opinion that the correct order that should have been made here is that the accused pay it not to UMNO, but, as contended by the Solicitor-General, to the Federal Government, as the administration of criminal justice is a federal subject...."

It would appear from these two authorities and also from *Mohamed bin Long* v. *Public Prosecutor*[4] (another Federal Court Reference) that where a court holds that there has been an acceptance of gratification by the accused person, it has no alternative but to impose the additional mandatory penalty on him. If the principal in respect of which the accused is alleged to be the agent, is a public body such as the National Electricity Board or the State Development Corporation, the court imposing the sentence may make an order for the additional penalty to be paid to such public body. If, however, that body is not a public one, the court will nevertheless make an order for a sum equivalent to the gratification received to be paid to the Federal Revenue.

And lastly, as regards the legality of the sentence, I do not think a concurrent term of 9 months' imprisonment can be described as manifestly excessive in a corruption offence, but it would be if the learned President, who is not *functus officio* in respect of the sentence in default of payment, were to impose a longer additional period than the present one for such default and I hope that, when assessing such in default term, he will have in mind that such term has to be consecutive and not concurrent.

For reasons above-stated I find no illegality in the learned President's order to warrant the exercise of my revisionary powers in this case and I make no order for revision.

Revision not allowed.

Solicitors: *Karpal Singh & Co.*